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No. 08-396

IN THE

Supreme Court of the United States

ROBERT MATICAN,

Petitioner,

v.

CITY OF NEW YORK, JOHN SCHNEIDER, JULIO C. ORDONEZ and CHRIS ZIMMERMAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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INTRODUCTION

This Reply Brief is submitted in further support of Matican's[1] petition for a writ of certiorari to the Second Circuit, and in response to Defendants' Brief in Opposition.

DEFENDANTS AND THE SECOND CIRCUIT HAVE MISREAD *COUNTY OF SACRAMENTO v. LEWIS*, 523 U.S. 833 (1998), WHICH SHOULD BE INTERPRETED, AS HAVE THE DECISIONS IN THE FIFTH, SIXTH, SEVENTH, EIGHTH, NINTH, AND TENTH CIRCUITS, TO REQUIRE THAT AN EMERGENCY SITUATION CONFRONT STATE EXECUTIVE ACTORS BEFORE THE HEIGHTENED *MENS REA* REQUIREMENT OF INTENT TO HARM BECOMES A NECESSARY ELEMENT OF A CIVIL RIGHTS ACTION FOR VIOLATION OF SUBSTANTIVE DUE PROCESS

In their opposition brief, Defendants describe as *dicta*, language in the Third, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuit decisions cited by Matican, and admit only that the Fifth Circuit in *Brown v. Nationsbank Corp.*, 188 F.3d 579 (5th Cir. 1999), *cert. denied* 530 U.S. 1271 (2000) holds in the same way that Matican advocates, *see* Br. in Opp. 3-4, that is, as requiring intent to harm only in emergency situations wherein state executive actors have behaved in a way that deprived private individuals of substantive due process rights. However, even assuming *arguendo* that

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[1] All defined terms in the Petition are adopted in this Reply Brief.

the cited portions of those decisions were not required to reach their particular holdings, this hardly undercuts Matican's argument as to how these Circuits interpret *Lewis*, or that the reasoning of the decisions of each of these circuits is contrary to the position of the Second Circuit. The Supreme Court rules do not specify that one of the factors considered by the Court in deciding whether to grant *certiorari* is that the holding of one circuit conflicts with the holding of another, only that "a United States court of appeals has entered a *decision* in conflict with the *decision* of another United States court of appeal". U.S. Sup. Ct. R. 10 (emphasis supplied). The word "decision" encompasses *dicta* as well as holdings, and, though not binding, may be followed where "sufficiently persuasive". *Central Green Co. v. United States*, 531 U.S. 425, 431 (2001), citing *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935). Indeed, aspects of *Lewis* which discuss the culpability standard applicable to non-emergency situations could be described as *dicta*, yet discerning their meaning has become the subject of significant debate among scholars, jurists, and litigants, *see, e.g.*, Erwin Chemerinsky, Substantive Due Process, Address Before the Practicing Law Insitute Section 1983 Civil Rights Litigation Symposium, *in* 15 Touro L. Rev. 1501, 1528 (1999) ("*Sacramento v. Lewis* is important because it implies that, apart from emergency situations, deliberate indifference is sufficient for deprivation") (footnote omitted).

In any event, contrary to Defendants' claim, *Brown, supra*, is not the only case Matican cites in which a federal circuit court held that proof of deliberate indifference is sufficient to shock the conscience, Br. in Opp. at 4. For example, Matican cites Eighth and D.C.

Circuit decisions that not only articulate but apply the deliberate indifference standard, *Putnam v. Keller*, 332 F.3d 541, 548 (8th Cir. 2003) (*cited in* Pet. 16 n.7); *Butera v. District of Columbia*, 235 F.3d 637, 652 (D.C. Cir. 2001) (applying standard in situation of state-created danger when "deliberation is practical") (*cited in* Pet. 16 for this proposition),[2] as well as another Eighth Circuit decision that applied a recklessness standard, *Wilson*

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[2] *Butera* ultimately held that the defendants therein were entitled to summary judgment on the basis of qualified immunity. *See id.* at 652-54. However, the decision as to whether a constitutional right was violated still constitutes a holding rather than *dicta*. This Court requires in § 1983 cases that the issue of whether a constitutional violation has occurred be determined before that of whether qualified immunity applies. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). This is the case because

> [i]n the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case.

Id. Disregarding the determination as to the existence of a constitutional right as *dicta* based on the recognition of qualified immunity in the same case would defeat this stated purpose.

v. Lawrence County, 260 F.3d 946, 956-57 (8th Cir. 2001). Defendants do not mention or attempt to distinguish *Putnam*, *Butera*, or *Wilson*.

While some of the cases Matican cites found that the conduct at issue was no worse than negligence, Br. in Opp. 3-4, Matican correctly characterizes these cases as providing for the employment of a deliberate indifference standard in non-emergency cases. Thus, *King v. St. Louis, 189*, 496 F.3d 812 (7th Cir. 2007), which found the conduct complained of represented at worst negligence, *id.* at 819, cited, in support of its proposition that a deliberate indifference standard applied, *Lewis* and *Armstrong v. Squadrito*, 152 F.3d 564 (7th Cir. 1998). *Armstrong* found that *Lewis* "endorsed the use of the deliberately indifferent standard for cases in which the defendants have the luxury of forethought," *id.* at 576, and, given the circumstances in which the defendant confinement guards had time to consider their actions, held that the plaintiff had raised "the serious possibility of deliberate indifference," therefore defeating those defendants' summary judgment motion, *id.* at 580. And while *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002), found that the conduct at issue was negligence at worst, *id.* at 513-16, *Ewolski* was followed in *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596, 602 (6th Cir. 2005), *cert. denied*, 547 U.S. 1129 (2006), which applied the deliberate indifference standard, *id.* at 602-03, and affirmed the district court's grant of summary judgment to plaintiff, finding that the plaintiff was entitled to judgment as a matter of law that certain police officer defendants had in fact been deliberately indifferent, *id.* at 603.

THE COURT SHOULD SCRUTINIZE THE NATURE AND RELATIVE SIGNIFICANCE OF COMPETING OBLIGATIONS

Even Defendants admit that *Brown*, 188 F.3d 579, holds that deliberate indifference is sufficient to shock the conscience, Br. in Opp. 4, but they attempt to distinguish it on the grounds that it lacked "any police obligation to remove a dangerous criminal from the streets," *id.* However, even assuming *arguendo* that the competing obligation Defendants considered was protection of members of the public, and not themselves, from Dealer, *Brown* is not supportive of Defendants. In the cited case, FBI agents had the obligation of rooting out "contract procurement fraud and other illegal activity committed in the aerospace community," *Brown*, 188 F.3d at 583, no less than the defendants herein had to apprehend drug dealers. Anyone engaged in contract procurement fraud in *Brown* was a "criminal", as was the Dealer in *Matican*. In the absence of being arrested following a successful investigation,[3] those who might be perpetrating fraudulent schemes in *Brown* would continue to pose a "danger" to society at large, as Matican's Dealer would continue to cause harm to his customers, although they were willing participants in his crime. Matican therefore submits that the objective of apprehending the subjects of the investigation in *Brown* was a "serious competing obligation" such that the Second Circuit Decision, had it been applied in *Brown*, would have mandated the result that intent to

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[3] The investigation of *Brown* was unsuccessful in light of the fact that no one was charged with the fraud (*Brown* at 584), but this circumstance does not change the analysis.

harm, rather than deliberate indifference, was necessary to shock the conscience there. Thus, the Second Circuit Decision does conflict with *Brown*, which warns that the Fifth Amendment of guarantee of substantive due process places limits upon government actors' conduct that, when "neither necessary nor proper" on the facts of any given case, cannot be used to "destroy the lives and businesses of innocent non-targets in the name of law enforcement." (*Brown* at 591.)[4]

Ironically, Defendants' opposition brief provides a powerful argument for why the Second Circuit was wrong in holding that even in the absence of an emergency situation, the mere assertion of the existence of a "serious competing obligation" is sufficient to insulate state actors from liability, for this invites defendants to raise disingenuous *post hoc* rationalizations. Although *Lewis* and its language concerning competing obligations long predated the commencement of this action, Defendants did not argue in their briefs to the District Court that they designed the Sting as they did so as to protect themselves or the public,[5] and made only a passing reference to these considerations in their brief to the Second Circuit.

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[4] In addition, Defendants' comment that *Brown* dismissed the case on qualified immunity grounds is irrelevant, for the reasons explained in footnote 2 hereof.

[5] Not surprisingly, the District Court's decision accordingly makes no mention of the need to remove a dangerous drug dealer from the streets or to protect the Defendant officers' own safety, instead citing the halfhearted measures Defendants took to protect Matican (*see* App. 33a-34a).

However, the Second Circuit seized upon the goal of protecting the officers themselves as a competing obligation requiring imposition of the intent-to-harm standard. Now, in opposition to Matican's Petition, Defendants apparently abandon the argument that they took sufficient means to protect Matican, and instead cite the need to "remove a dangerous criminal from the streets" Br. in Opp. 4, "before he could blight any more lives," *id.* at 3. Yet Defendants could not have had an obligation of protecting the public from a "dangerous criminal" that competed with their duty to protect Matican, unless they knew at the time they conceived the Sting that Dealer was dangerous to themselves and to the public. Defendants avoided this argument earlier because if they knew that the Dealer was a serious threat, then they also knew that the Sting subjected Matican to vengeance from a "dangerous criminal", increasing the likelihood the lower courts would have found they had sufficient culpability for their actions to shock the conscience. Defendants did not invoke the safety of themselves or of the public when they believed this position did not suit their purposes, but now seize upon these reasons which they now apparently consider advantageous to them. Such after-the-fact rationalizations underscore the danger of uncritical acceptance of the reasons proffered by law enforcement officers as "competing obligations" to their duty to private individuals whom they have placed in danger, or with whom they have a special relationship.

Furthermore, Defendants fail to rebut Matican's argument in his Petition that the competing obligations arose because of Defendants' own actions. When state actors have time to deliberate, they should consider

alternatives when the liberty interests of individuals are at stake. In Matican's case, the police, in a non-exigent situation, did not have to choose between removing an imminently dangerous drug dealer from the streets and protecting Matican's interests. To the contrary, both of these allegedly competing interests could have been served by designing a plan which would not make obvious Matican's involvement in Dealer's arrest, an approach Defendants have never denied could have been fashioned. Where an alternative to the violation of a liberty interest exists, it should be taken into account in determining whether there has been a violation of substantive due process. In *Washington v. Harper*, 494 U.S. 210, 224 (1990), this Court was faced with the administration of anti-psychotic drugs to an inmate against his will. In rejecting the inmate's Section 1983 claim, the court noted that it had not been shown that there were alternatives that would accommodate the inmate's rights, and which would take into account legitimate government interests. Here, however, such alternatives clearly existed.

Defendants also contend that the Second Circuit "properly declined to second-guess the weight placed on each of its competing obligations" (Br. in Opp. at 3). Yet, every time a court rules that a police search was unconstitutional, or that a police officer used excessive force, the court is "second-guessing" the police, which is a judicial fact of life that can only be avoided by insulating from scrutiny all activities of police officers – if not all state actors (for the Second Circuit Decision is not limited to police officers) – regardless of how disproportionate the injury inflicted thereby to the harm sought to be prevented, or how inappropriate in

light of superior alternatives. Virtually any act can be justified by the claim that in some way the actors performed their duty in the public's interest.

The Defendants' argument that the court should not scrutinize their conduct because this would involve impermissible interference with their choice between competing alternatives, fails to heed the admonition of this Court in *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982), where a decision made by a prison physician in a non-emergency setting was held to be within the ambit of judicial review. There the court expressly states that the mere fact that a physician had made a medical decision relating to an inmate does not make it "certain that professional judgment in fact was exercised." *See also, Westlake v. Lucas*, 537 F.2d 857, 860 (6th Cir. 1976) (opining, in a case alleging that prison officials failed to respond to a prisoner's request for medical attention, that "where the circumstances are clearly sufficient to indicate the need of medical attention for injury or illness, the denial of such aid constitutes the deprivation of constitutional due process", thereby crossing the line from medical malpractice to civil rights violation.)

The danger in a court second-guessing law enforcement officers is greatest when there is an emergency situation, as was the case in *Lewis*. As the Fifth Circuit observed in *Wagner v. Bay City, Tex.*, 227 F.3d 316 (5th Cir. 2000), courts should be "careful not to engage in second-guessing officers in situations in which they have to make split-second, on-the-scene decisions while confronted with a violent individual." *Id.* at 321. Yet, this hesitancy does not relieve courts of their

obligation "to determine whether . . . officers' actions [are] objectively unreasonable, in light of clearly-established law at the time, and in light of the information the officers possessed." *Id.* An "undue fear of judicial second-guessing," *Akers v. Caperton*, 998 F.2d 220, 226 (4th Cir. 1993), can create an improper balance between judicial efforts to avoid deterrence to those government servants, and the protecting of liberty interests of private individuals.

THE PUBLIC'S INTEREST IS ADVANCED BY MATICAN'S POSITION, NOT THAT OF THE DEFENDANTS

The public's interest should be a factor in Section 1983 cases but not in the way suggested by the Defendants. As noted by Matican, the credibility of government should not be sacrificed by granting immunity to law enforcement officers from liability for deliberate indifference to the liberty interests of those they have placed in danger by false assurances. (Pet. 30-33.) In arguing of the danger to the public in not apprehending Matican's Dealer in the hastily conceived and clumsily executed Sting that revealed Matican's identity, the Defendants have sidestepped the real issue. Apart from the fact that the holding of the Second Circuit Decision can be applied to anyone to whom the police have a duty to protect, even an approach restricting the Second Circuit Decision to CIs would have an enormous impact, for the use of CIs is commonplace. *See* Fed. Bureau of Investigation, *FY 2008 Authorization and Budget Request to Congress* 4-22, 4-25 (undated) (stating that the FBI receives information provided by over

15,000 "Confidential Human Source[s]"), *available at* http://www.usdoj.gov/jmd/2008justification/office/ 3_01_ justification.doc; U.S. Dep't of Justice, Office of the Inspector General, Audit Report: The Drug Enforcement Agency's Payments to Confidential Sources (July 2005) (stating that the DEA "has approximately 4,000 confidential sources at any one time"), *available at* http://www. usdoj. gov/oig/ reports/ DEA/a05; Jennifer Portman, *Hoffman Case Is Latest in National Debate Over Confidential Informants*, Tallahassee Democrat, May 17, 2008 (stating that Tallahassee Police Department has used 414 confidential informants since 2000). If in the practice of law enforcement, deception of CIs is given judicial sanction, citizens will protect themselves by not cooperating, and accordingly, law enforcement will lose a valuable tool. Law enforcement officials should be more farsighted than the Defendants herein, heeding Pyrrhus's words: "Another such victory and I am undone."

CONCLUSION

The Petition for a Writ of *Certiorari* to the Second Circuit should be granted.

Respectfully submitted,

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